U.S. Senator John Cornyn

Privacy, Security and Information: A Look at FOIA in the Post-9/11 World
Oversight Hearing:
"Information Policy in the 21st Century: A Review of the Freedom of Information Act"

House Government Reform Subcommittee on
Government Management, Finance, and Accountability
Wednesday, May 11, 2005, 2:00 p.m., Rayburn House Office Building Room 2247

I would like to offer my thanks and congratulations to Representatives Tom Davis, chairman of the House Government Reform Committee; Henry A. Waxman, the committee's ranking member; Todd Platts, chairman of the Subcommittee on Government Management, Finance, and Accountability; and the subcommittee's ranking member, Edolphus Towns. I am pleased that the subcommittee is holding this hearing today on the topic of open government and the Freedom of Information Act.

The cause of open government is one that is near and dear to my heart. As Attorney General of Texas, I was responsible for enforcing Texas's open government laws. I have always been proud that Texas is known for having one of the strongest and most robust freedom of information laws in the country, and I have long been looking forward to bringing a little of our Texas sunshine to Washington.

On March 15, 2005, during the first-ever National Sunshine Week, I chaired a Senate Judiciary subcommittee hearing entitled "Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005." The hearing was the third in a series of bipartisan events in which Senator Patrick Leahy and I have joined forces to promote the cause of open government. On February 16, shortly before the President's Day recess in February, Senator Leahy and I went to the Senate floor together to introduce the OPEN Government Act (S. 394) – legislation that promotes accountability, accessibility, and openness in the federal government, principally by strengthening and enhancing FOIA. And on March 10, Senator Leahy and I joined forces again to introduce the Faster FOIA Act of 2005 (S. 589). Moreover, two days after the hearing, on March 17, the Senate Judiciary Committee approved the Faster FOIA Act and sent the legislation to the full Senate.

I am pleased that distinguished Representatives of both parties have seen fit to introduce companion bills in the House. I am especially gratified that my fellow Texan, Representative Lamar Smith, has decided to sponsor the OPEN Government Act (H.R. 867) and has agreed to co-sponsor the Faster FOIA Act. And I'm pleased that Representative Brad Sherman, with whom I am also working to reform the Presidential succession law, is sponsoring the Faster FOIA Act (H.R. 1620).

I'm also grateful that a number of members of Congress, on both sides of the aisle, have agreed to co-sponsor either or both bills – including Senators Lamar Alexander, Chuck Grassley, Johnny Isakson, Dick Durbin, Russ Feingold, and Ben Nelson, as well as Representatives

Michael McCaul, Jerry Moran, Ron Paul, Brian Baird, Howard Berman, Rick Boucher, Henry Cuellar, Major Owens, Mark Udall, and Lynn Woolsey.

The Faster FOIA Act would simply establish an advisory commission of experts and government officials to study what changes in federal law and federal policy are needed to ensure more effective and timely compliance with the FOIA law.

The OPEN Government Act contains important Congressional findings to reiterate and reinforce our belief that FOIA establishes a presumption of openness, and that our government is based not on the need to know, but upon the fundamental *right* to know. In addition, the Act contains over a dozen substantive provisions, designed to achieve four important objectives: (1) to strengthen FOIA and close loopholes, (2) to help FOIA requestors obtain timely responses to their requests, (3) to ensure that agencies have strong incentives to act on FOIA requests in a timely fashion, and (4) to provide FOIA officials with all of the tools they need to ensure that our government remains open and accessible.

Specifically, the legislation would make clear that FOIA applies even when agency recordkeeping functions are outsourced. It would require an open government impact statement to ensure that any new FOIA exemption adopted by Congress be explicit. It provides annual reporting on the usage of the new disclosure exemption for critical infrastructure information, and strengthens and expands access to FOIA fee waivers for all media. It ensures accurate reporting of FOIA agency performance by distinguishing between first person requests for personal information and other, more burdensome kinds of requests.

The Act would also help FOIA requestors obtain timely responses by establishing a new FOIA hotline service to enable requestors to track the status of their requests. It would create a new FOIA ombudsman, located within the Administrative Conference of the United States, to review agency FOIA compliance and provide alternatives to litigation. And it would authorize reasonable recovery of attorney fees when litigation is inevitable.

The legislation would restore meaningful deadlines for agency action and impose real consequences on federal agencies for missing statutory deadlines. It would enhance provisions in current law which authorize disciplinary action against government officials who arbitrarily and capriciously deny disclosure and yet which have never been used in over thirty years. And it will help identify agencies plagued by excessive delay.

Finally, the bill will help improve personnel policies for FOIA officials, examine the need for FOIA awareness training for federal employees, and determine the appropriate funding levels needed to ensure agency FOIA compliance.

The OPEN Government Act is not just pro-openness, pro-accountability, and pro-accessibility – it is also pro-Internet. It requires government agencies to establish a hotline to enable citizens to track their FOIA requests, including Internet tracking, and it grants the same privileged FOIA fee status currently enjoyed by traditional media outlets to bloggers and others who publish reports on the Internet.

The OPEN Government Act is the product of months of extensive discussions between my office, Senator Leahy's office, and numerous advocacy and watchdog groups. I am pleased that the bill is supported by Texas Attorney General Greg Abbott as well as a broad coalition of open government advocates and organizations across the ideological spectrum, including the following organizations:

American Association of Law Libraries
American Civil Liberties Union
American Library Association
American Society of Newspaper Editors
Associated Press Managing Editors
Association of Alternative Newsweeklies
Association of Health Care Journalists
Center for Democracy & Technology
Coalition of Journalists for Open Government
Committee of Concerned Journalists
Common Cause
Education Writers Association
Electronic Privacy Information Center
Federation of American Scientists/Project on Government Secrecy
Free Congress Foundation/Center for Privacy & Technology Policy
Freedom of Information Center, Univ. of Mo.
The Freedom of Information Foundation of TX
The Heritage Foundation/Center for Media and Public Policy
Information Trust
League of Women Voters of the United States
Magazine Publishers of America
National Conference of Editorial Writers
National Freedom of Information Coalition
National Newspaper Association
National Press Club
National Security Archive/Geo. Wash. Univ.
Newspaper Association of America
OMB Watch
OpenTheGovernment.org
People for the American Way
Project on Government Oversight
Radio-Television News Directors Association
Reporters Committee for Freedom of the Press
Society of Environmental Journalists

I have also discussed these efforts with various senior officials throughout the Administration on a variety of occasions.

I would like to make just a few comments on the written testimony of the Justice Department submitted to this House subcommittee late yesterday evening. At the March 15 Senate hearing I chaired, I noted:

> I am pleased by recent positive comments about the legislation from the Department of Justice. I certainly understand that no Administration is ever excited about the idea of Congress increasing its administrative burdens. And I look forward to any technical comments and expressions of concern that the Administration may choose to provide. But I do appreciate that the Justice Department's own website notes that this legislation, and I quote, "holds the possibility of leading to significant improvements in the Freedom of Information Act." As Attorney General Alberto Gonzales and I discussed during his confirmation hearings in January, we plan to work together on ways to strengthen the Freedom of Information Act. I look forward to working with General Gonzales, and with Senator Leahy and our other colleagues in the Senate and in the House, to moving this legislation through the process.

The Justice Department's written testimony raises questions. As far as I can tell, the written testimony does not specifically withdraw the Department's previous comment, or specifically oppose (at least not by name) either of the two bills that Senator Leahy and I have introduced. Yet the testimony nevertheless makes clear that the Department sees no reason to amend FOIA (other than to reverse at least a portion of a unanimous U.S. Supreme Court ruling, *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), that construed one of the exemptions under FOIA more narrowly than the Department would have preferred – a proposal I am happy to study and to consider).

Moreover, the testimony explicitly opposes any effort to amend FOIA in order to reverse the effects of another Supreme Court decision on FOIA legislation – as section 4 of the OPEN Government Act would do. I would like to take a moment to explain my concerns with this particular portion of the testimony.

Under traditional "prevailing party" statutes, a party that clearly loses a lawsuit – such as through a judgment on the merits, or a settlement agreement enforced through a consent decree – must pay the reasonable attorneys' fees of the prevailing party. In a recent 5-4 decision, however, the Supreme Court held that a party does *not* have to pay the attorney's fees of the other party, notwithstanding the application of a prevailing party statute, "where there is no judicially sanctioned change in the legal relationship of the parties" – such as when a defendant belatedly gives the plaintiff everything that is asked, perhaps in order to avoid a judgment from the court itself. *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 605 (2001). In other words, under this legal interpretation, a party would not be entitled to attorneys' fees even if the lawsuit was the primary or even sole "catalyst" of the change.

I make no comment on the correctness of the Court's *Buckhannon* ruling as a *legal* matter. As a *policy* matter, however, *Buckhannon* raises serious and special concerns within the FOIA context.

Under *Buckhannon*, it is now theoretically possible for an obstinate government agency to substantially deter many legitimate and meritorious FOIA requests. Here's how: A government agency refuses to disclose documents even though they are clearly subject to FOIA. The FOIA requestor has no choice but to undertake the time and expense of hiring an attorney to file suit to compel FOIA disclosure. Some time after the suit is filed, the government agency eventually decides to disclose the documents – thereby rendering the lawsuit moot. By doing so, the agency can cite *Buckhannon* for the proposition that, because there is no court-ordered judgment favoring the requestor, the requestor is not entitled to recover attorneys' fees.

This straightforward application of the *Buckhannon* ruling effectively taxes all potential FOIA requestors. As a result, many attorneys could stop taking on FOIA clients – and many FOIA requestors could stop making even legitimate and public-minded FOIA requests – rather than pay what one might call the "*Buckhannon* tax."

How pervasive is this problem in reality? Let me state upfront that I believe strongly that the vast majority of federal employees and officials are good people who go to work every morning hoping to do the best job that they can. In fact, I believe that a robust and fully effective FOIA system would help demonstrate just how often government officials do a good job.

Nevertheless, the temptation to take advantage of the *Buckhannon* decision in the FOIA context is very real. Indeed, in just the short time my office has been provided to respond to the Department's testimony, we have already collected various examples. I attach letters from FOIA practitioners and requestors here.

One letter from Clark Hoyt, Washington Editor for Knight Ridder, describes an effort to secure information about the Department of Veterans Affairs and its efforts to examine the processing of disability claims by veterans. The letter notes: "My personal view is that the agency was following a pattern of stonewalling until it knew it could resist no longer. It forced us to spend thousands of dollars to compel its adherence to the law, delayed our stories by many months and then caved at the last minute, knowing it had no chance of winning in court. The final step in this pattern was the filing for summary judgment, which ignored the agency's flagrant violations of the Act's time limitations for production and seeks to avoid paying the plaintiff's legal fees. This is a reprehensible pattern, and I'm delighted that the Cornyn-Leahy bill would address it directly."

The National Security Archive has a similar tale to tell. And as the Archive's General Counsel, Meredith Fuchs, concludes: "In my view, this sort of manipulation of the timing of records releases is a purposeful litigation strategy designed to put off release of information that someone does not want to release until the government knows that it can no longer resist because a court will not agree with the withholding. It is an attempt to evade FOIA's attorney's fees provision by denying the FOIA requester a judicial decision ordering the release. It diverts FOIA requesters' resources unnecessarily into litigation that could be avoided by proper initial handling of FOIA requests."

And there are other examples.[1] Indeed, according to one *former* FOIA attorney: "I generally represent my clients on a *pro bono* basis. However, I am no longer able to take most FOIA cases because I know it is highly likely that the agency will turn over the documents after I file suit and then refuse to pay attorneys' fees and expenses."

One final point about the Department's written testimony. The testimony cites as authority a passage from the *Buckhannon* majority opinion, authored by Chief Justice Rehnquist, stating that the fears of abuses, such as those described in this statement, are "entirely speculative and unsupported by any empirical evidence."

This quotation warrants several comments.

First, the examples provided here, and collected under extraordinarily short time constraints, should put to rest any claim that members of Congress are somehow wildly speculating about problems in the administration of FOIA.

Second, the effort to cite *Buckhannon* is itself curious. After all, the Chief Justice was referring only to the litigants in the case – *not to policymakers* – in stating that fears of such abuses are "entirely speculative and unsupported by any empirical evidence." *Id.* at 608. Indeed, he makes clear later in the opinion that the Court is *not* "determin[ing] which way these various policy arguments cut," but is instead ruling solely on the basis of the *legal* issues presented in the case. *Id.* at 610.

What's more, the Chief Justice specifically points out that the "fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." *Id.* at 608-9. *So the Chief Justice was not even referring to FOIA plaintiffs.* After all, FOIA plaintiffs do not generally pursue monetary damages, because FOIA does not provide for monetary damages. As one commentator has noted:

> *Buckhannon*'s bar on catalyst attorneys' fees threatens FOIA actions to an even greater extent than it does traditional civil rights litigation. Many civil rights claims for damages are immune from *Buckhannon*'s greatest impact because defendants cannot easily moot damages claims by capitulating. Plaintiffs may reject settlement offers, increase their demands, or require attorneys' fees as part of a settlement. In the case of equitable relief, when defendants voluntarily remedy civil rights plaintiffs' injunctive claims, courts will not dismiss a plaintiff's action as moot if the defendant might repeat the challenged conduct. Although those conditions will aid some civil rights plaintiffs in avoiding

[1] *See, e.g., Landers v. Department of Air Force*, 257 F. Supp. 2d 1011, 1012-13 (S.D. Ohio 2003) ("After this litigation had been initiated, the Defendant produced responsive documents to the Plaintiff and requested that the Court, as a result, dismiss this lawsuit as moot. . . . It could not be questioned that this lawsuit was the catalyst which led to the disclosure of the documents, the production of which the Plaintiff had requested. Without filing this lawsuit, the Defendant would not have complied with its statutory duty to produce the requested documents. Nevertheless, the Plaintiff is not entitled to recover his attorney's fees, since he obtained no relief from this Court. . . . Aware of *Buckhannon*, the Plaintiff argues that this Court should, nevertheless, exercise its equitable discretion and award him attorney's fees. Since this Court is without such discretion, it declines that request.").

> *Buckhannon*, they will rarely assist a FOIA fee claimant. Plaintiffs never claim damages under FOIA because the law does not provide for them, and they rarely seek ongoing injunctive relief or declaratory judgments. Nearly all FOIA actions simply demand a one-time release of documents. Therefore, . . . government defendants could moot virtually all FOIA claims on the eve of judgment and deny compensation to successful plaintiffs' attorneys. Under such an arrangement, only parties capable of risking litigating without compensation would be able to enforce FOIA against intransigent government agencies. Furthermore, even in those cases, agencies would be able to prolong the litigation without fear of paying costs for their opponents. These bars to access, expediency, and enforceability directly contravene the purposes of amendments to FOIA and, as noted above, would greatly diminish FOIA's value for public interest actions--the very claims that FOIA fees promote.

David Arkush, *Preserving "Catalyst" Attorneys' Fees Under the Freedom of Information Act in the Wake of* Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources, 37 Harv. C.R.-C.L. L. Rev. 131, 137-38 (2002).

Even the concurring opinion of Justice Antonin Scalia acknowledges that the *Buckhannon* ruling will "sometimes den[y] fees to the plaintiff with a solid case whose adversary slinks away on the eve of judgment." *Id.* at 618 (Scalia, J., concurring). And as always, Justice Scalia is careful to distinguish the legal arguments in the case, which the Supreme Court must entertain, from the policy arguments, which are the province of the Congress to resolve. *See id.* at 616.

I find the actions of the Justice Department, described above, curious. Accordingly, and assuming that my schedule permits, I will plan to raise this issue at a Senate Judiciary Committee hearing currently scheduled for the afternoon of Thursday, May 12. That hearing will consider a number of Justice Department nominations, including a nomination to the position of Assistant Attorney General for the Office of Legal Policy – an office that plays a role in coordinating various legal policy issues for the Department, including FOIA policy.

Again, I would like to congratulate the members of this committee and subcommittee for today's hearing. I look forward to future bipartisan efforts to enhance the openness, accountability, and accessibility of our government, consistent with the founding principles of our nation.

KNIGHT RIDDER

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April 21, 2005

James C. Ho
Chief Counsel
U.S. Senator John Cornyn, Chairman
U.S. Senate Judiciary Subcommittee on Immigration, Border Security & Citizenship
Dirksen Senate Office Building
Room 139
Washington, DC 20510

Dear Mr. Ho:

Early in 2004, Chris Adams and Alison Young, investigative reporters in the Knight Ridder Washington bureau, began looking into how promptly and correctly the Department of Veterans Affairs processes disability claims by veterans. Historically, veterans have endured long waits and inconsistent decisions by the VA, many of which are overturned on appeal. With thousands of new combat veterans from the wars in Afghanistan and Iraq likely to be filing with the agency, we wanted to see if it had fulfilled promises to reform its procedures.

Adams and Young made their first requests to the VA in February, 2004, for records and databases related to claims handling. Having no success in obtaining what they were after, they filed the first of 30 FOIA requests in April. Despite the requirements of the Freedom of Information Act, the VA delayed, ignored or rejected the requests, frequently missing the Act's deadlines by weeks or months. The agency asserted a number of reasons for denying our requests, including in some cases business confidentiality for records that were as much as 50 years old. Throughout the process, agency officials acted as though the request for information that was clearly public was somehow inappropriate. I want to stress that, at no time, were we asking for confidential information, such as individuals' medical records or any other catetgory that would be exempt under FOIA.

In the spirit of Sen. Cornyn's view that freedom of government information is an important value because the government works for the people, not the other way around, our intention was to assess how well the Department of Veterans Affairs is serving veterans who have made enormous sacrifices to defend the American people.

Basically our requests centered on two classes of records. First we wanted to get copies of the various electronic databases that the VA maintains to assess just how well it is performing in handling claims. Second, we wanted documentation of the agency's oversight of the officially designated Veterans Service Officers, who are charged by the government with helping millions of veterans file their claims for compensation for service connected disabilities, injuries and illnesses.

When we contacted officials about obtaining copies of the VA databases, we first asked for the technical layout of the electronic files. We needed this information to know if the databases we were seeking actually contained data that would be useful for us. The VA never produced the technical layouts and only produced the databases in November and December, after we filed suit.

When we asked for records on the revocation, suspension or denial of VA accreditation of Veterans Service Officers, the agency took three months to deny our request, but at the same time offered to give up 275,000 pages of irrelevant documents at a cost of $41,250. We appealed to the VA's chief FOIA officer and on Sept. 30, got letters and memos on the revocation of accreditation for two people. On Oct. 8, we got more records on another person.

On Nov. 1, 2004, we filed suit in U.S. District Court for the District of Columbia, seeking to compel the VA to live up to the requirements of the Freedom of Information Act. Our case, No. 04-1896 (GK), was assigned to Judge Gladys Kessler.

On Feb. 15, 2005, the judge ordered the VA to speed up the production of records for purposes of discovery. Her order produced another 2,250 documents on the issues of Veterans Service Officers and an admission from the VA that the agency had disciplined only two individuals since 1999, despite the fact that other VA records indicated widespread failures on the part of VSOs to adequately represent the interests of veterans filing claims.

Ultimately, the VA provided all the records we sued over, the last of which was received on March 9, 2005, three days after we published our package of stories detailing the failings of the VA to properly handle claims. In thousands of cases, Knight Ridder reported, veterans die years after they file their claims -- still without a decision.

The VA has now filed a motion for summary judgment on the grounds that it fully complied with FOIA in our case. We will file in opposition and will seek sanctions against the agency -- including mandatory FOIA training for key personnel, an agreement by the agency to abide by the law and recovery of our substantial attorney fees, which are in excess of $30,000, and climbing.

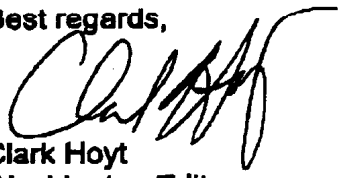
My personal view is that the agency was following a pattern of stonewalling until it knew it could resist no longer. It forced us to spend thousands of dollars to compel its adherence to the law, delayed our stories by many months and then caved at the last minute, knowing it had no chance of winning in court. The final step in this pattern was the filing for summary judgment, which ignored the agency's flagrant violations of the Act's time limitations for production and seeks to avoid paying the plaintiff's legal fees. This is a reprehensible pattern, and I'm delighted that the Cornyn-Leahy bill would address it directly.

Please let me know if there is any other information you need. Also feel free to contact our investigations editor, Jim Asher, who worked closely with our FOIA attorney in the case. Jim can be reached at 202-383-6053.

You can read the stories by Adams and Young on our Web site, www.krwashington.com. I am appending our complaint filed in federal district court.

I can't tell you how much we appreciate your interest in our case and in the much broader issue of openness in government.

Best regards,



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May 10, 2005

The Honorable John Cornyn
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
United States Senate
Washington, DC 20510

Dear Senators Cornyn and Leahy:

On April 23, 2004, Professor Ralph Begleiter, a University of Delaware professor and a former CNN correspondent, filed a Freedom of Information Act (FOIA) request seeking two categories of information: (1) copies of 361 photographic images of the honor ceremony at Dover Air Force Base for fallen U.S. military returning home to the United States that already had been released to another FOIA requester; and (2) similar images taken after October 7, 2001 at any U.S. military facility.

The unnecessarily prolonged history of this FOIA request demonstrates how plaintiffs often are forced to take the extreme measure of filing a lawsuit to get the government to release information (which in this case probably was not too hard to find or review). And then how, when faced with the obligation to respond in court to the unreasonable denial of the FOIA request or unnecessary delay in processing, the government sometimes simply releases the records. This litigation strategy imposes significant burdens on the FOIA requester, who must locate counsel and participate in litigation, but denies the requester any recompense for fulfilling the "private attorney general" role envisioned by the FOIA, since the absence of a final court ruling requiring the disclosure often denies the plaintiff statutory attorneys' fees.

On June 30, 2004 – 48 business days after Professor Begleiter's request was filed and more than twice the response time permitted under the FOIA – Mr. Begleiter filed an administrative appeal of his April 23, 2004 FOIA request. The appeal was never acknowledged or responded to by the Air Force.

As of September 2004 – five months after the request was filed – Professor Begleiter had received no substantive response to the FOIA request or administrative appeal. Professor Begleiter then contacted each of the two FOIA personnel at the Department of Air Force who had acknowledged receipt of the FOIA request and was told by one person that there were no records and by another that the request was being processed. It was at that point that Professor Begleiter determined to file suit.

On October 4, 2004, Professor Begleiter filed suit for the records requested on April 23, 2004, and in subsequent FOIA requests for similar images. On November 22, 2004, the Air Force provided Professor Begleiter a CD-ROM with the 361 images that had been released six months earlier to another FOIA requester and denied the remainder of his request claiming that it had no more responsive records. When

Professor Begleiter demonstrated to the Air Force in an administrative appeal that its response was incorrect – since he had evidence that numerous other photographic images fitting the description in his FOIA request existed – the Air Force asked for additional time to search a range of components and agencies that had not been searched in the first place. Professor Begleiter, through counsel, agreed to provide the Air Force with additional time and the litigation was stayed at the end of December 2004 pending completion of the search. At the end of February 2005, Professor Begleiter agreed to wait another 30 days for the search to be completed. On March 25, 2005, however, Professor Begleiter informed the court and the Air Force that his counsel was preparing a motion for summary judgment based on the Air Force's failure to process the FOIA request. In response to that notice, on April 8, 2005, the government advised Professor Begleiter's counsel that hundreds of additional images would soon be provided. Ninety-two images were provided on April 15, and an additional 268 images were provided on April 25, 2005. Professor Begleiter is in the process of deciding future steps in the lawsuit.

It was not until he filed his lawsuit that Professor Begleiter obtained release of records that previously had been provided to another FOIA requester. It took an entire year, the filing of a lawsuit, and finally the notice that a summary judgment motion was being prepared to obtain any additional substantive response to the FOIA request. In my view, this sort of manipulation of the timing of records releases is a purposeful litigation strategy designed to put off release of information that someone does not want to release until the government knows that it can no longer resist because a court will not agree with the withholding. It is an attempt to evade FOIA's attorney's fees provision by denying the FOIA requester a judicial decision ordering the release. It diverts FOIA requesters' resources unnecessarily into litigation that could be avoided by proper initial handling of FOIA requests.

Please feel free to contact me with any questions you may have or for more information about Professor Begleiter's lawsuit.

Thank you for your efforts to strengthen the accountability of our government agencies.

Sincerely,

Meredith Fuchs
General Counsel

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VIA E-MAIL

May 10, 2005

The Honorable John Cornyn
United States Senate
517 Hart Senate Office Building
Washington, D.C. 20510-4304

The Honorable Patrick Leahy
United States Senator
433 Russell Senate Office Bldg
Washington, DC 20510

Dear Senator Cornyn and Senator Leahy:

It is my understanding that Congress is considering changing the language of the Freedom of Information Act (FOIA) to allow for the recovery of attorneys' fees and expenses if the agency turns over the requested documents after a suit is filed, regardless of whether or not a court orders the agency to turn over the documents. I think such a change would serve the public interest.

In the following two cases, I filed suit, and shortly after I filed suit, the agency turned over the requested documents and I did not recovery attorney fees.

Forest Guardians v. U.S. Fish and Wildlife Service, 04-N-1396 (OES)(D.Colo. 2004)

Forest Guardians v. U.S. Fish and Wildlife Service, 04-MW-2529 (OES)(D.Colo. 2005)

I generally represent my clients on a *pro bono* basis. However, I am no longer able to take most FOIA cases because I know it is highly likely that the agency will turn over the documents after I file suit and then refuse to pay attorneys' fees and expenses.

Thank you for your consideration of this important issue.

Sincerely,

/s Robert Ukeiley
Robert Ukeiley, Esq.

C

Motions, Pleadings and Filings

United States District Court,
S.D. Ohio,
Western Division.
Mark E. LANDERS, Plaintiff,
v.
DEPARTMENT OF THE AIR FORCE, Defendant.
No. C-3-00-567.

March 7, 2003.

Action was brought against the Department of the Air Force under the Freedom of Information Act (FOIA). After decision was entered holding the case moot due to Air Force's production of the requested documents, plaintiff moved for statutory award of attorney fees as the prevailing party. The District Court, Rice, Chief Judge, held that plaintiff was not a prevailing party for purpose of attorney fee award.

Motion denied.

West Headnotes

Records ⚖**68**
326k68 Most Cited Cases
Plaintiff in Freedom of Information Act (FOIA) action against the Department of the Air Force was not a "prevailing party" for purpose of a statutory award of attorney fees, even though the lawsuit was the catalyst which led to the disclosure of the documents that plaintiff requested, where the suit was dismissed as moot when the Air Force produced responsive documents after the suit was filed; plaintiff obtained no relief from the court. 5 U.S.C.A. § 552(a)(4)(E).

***1011** Gary Alan Loxley, Dayton, OH, for Plaintiff.

Gregory Gordon Lockhart, Dale Ann Goldberg, United States Attorney's Office, Dayton, OH, for Defendant.

DECISION AND ENTRY OVERRULING PLAINTIFF'S MOTION FOR ATTORNEY'S FEES (DOC. # 41)

RICE, Chief Judge.

Plaintiff brought this litigation under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking both a declaration that the Defendant has violated that statute by failing to produce documents in response to his request under the FOIA, ***1012** and an order of the Court directing the Defendant to produce those documents. The Plaintiff also sought an award of reasonable attorney's fees, in accordance with § 552(a)(4)(E). After this litigation had been initiated, the Defendant produced responsive documents to the Plaintiff and requested that the Court, as a result, dismiss this lawsuit as moot. *See* Doc. # 18. On February 25, 2002, this Court entered a Decision, concluding that the Defendant's production of documents had rendered this lawsuit moot. *See* Doc. # 30.

This case is now before the Court on the Plaintiff's Motion for Attorney's Fees (Doc. # 41). The award of attorney's fees in an action under the FOIA is governed by 5 U.S.C. § 552(a)(4)(E), which provides that a District Court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." For reasons which follow, the Court concludes that the Plaintiff has not "substantially prevailed" in this litigation and that, therefore, he is not entitled to an award of attorney's fees. [FN1]

FN1. As a consequence, it is not necessary

> to address the Defendant's assertion that the Court should deny Plaintiff's request for attorney's fees, because it was not made within 14 days of the entry of judgment, as is required by Rule 54(d)(2) of the Federal Rules of Civil Procedure.

In *Buckhannon Board & Care Home, Inc., v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), the Supreme Court addressed statutes which provide that the "prevailing party" can recover attorney's fees. In particular, the *Buckhannon* Court rejected the proposition that the catalyst theory was a proper basis for awarding attorney's fees under such statutes and held that a "prevailing party" is one who has been awarded relief by the court, either through a judgment on the merits or a court-ordered consent decree. Therein, the Supreme Court reiterated that it has interpreted fee shifting provisions consistently. *Id.* at 603 n. 4, 121 S.Ct. 1835 (citing *Hensley v. Eckerhart,* 461 U.S. 424, 433 n. 7, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). In light of *Buckhannon,* the courts which have considered the question have held that "substantially prevailed," as used in the FOIA, should be interpreted consistently with the definition of "prevailing party." *Oil, Chemical and Atomic Workers v. D.O.E.,* 288 F.3d 452 (D.C.Cir.2002); *Union of Needletrades, Industrial and Textile Employers v. United States Immigration and Naturalization Service,* 202 F.Supp.2d 265 (S.D.N.Y.2002). Thus, those courts have held that the plaintiff in an action under the FOIA must have been awarded relief, such as a judgment on the merits or a court-ordered consent decree, in order to be entitled to recover attorney's fees under that statute. This Court finds the result reached and the rationale employed by those decisions to be compelling and will, therefore, follow them.

It could not be questioned that this lawsuit was the catalyst which led to the disclosure of the documents, the production of which the Plaintiff had requested. Without filing this lawsuit, the Defendant would not have complied with its statutory duty to produce the requested documents. Nevertheless, the Plaintiff is not entitled to recover his attorney's fees, since he obtained no relief from this Court. Accordingly, the Court concludes that the Plaintiff did not substantially prevail and that, therefore, he is not entitled to recover his attorney's fees under § 552(a)(4)(E).

Aware of *Buckhannon,* the Plaintiff argues that this Court should, nevertheless, exercise its equitable discretion and award ***1013** him attorney's fees. Since this Court is without such discretion, it declines that request. In *Alyeska Pipeline Serv. Co. v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), the Supreme Court reiterated that the American Rule applies in federal courts, so that each party is responsible for paying its own attorney's fees, unless Congress has provided otherwise by statute. [FN2] Thus, this Court is without equitable discretion to award attorney's fees to Plaintiff. Moreover, it is axiomatic that this Court cannot require the United States to pay an opposing litigant's attorney's fees, unless it has waived its sovereign immunity. *Library of Congress v. Shaw,* 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986). The United States has not waived its sovereign immunity to permit a District Court to exercise its equitable discretion to require the Government to pay an opponent's attorney's fees.

> FN2. Therein, the Supreme Court also acknowledged that a federal court retains the inherent authority to award attorney's fees when one party has litigated in bad faith. Herein, the Plaintiff does not assert that the Defendant has so litigated.

Accordingly, the Court overrules Plaintiff's Motion for Attorney's Fees (Doc. # 41).

257 F.Supp.2d 1011

Motions, Pleadings and Filings (Back to top)

- 3:00CV00567 (Docket)
  (Nov. 30, 2000)

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JOHN CORNYN
TEXAS

United States Senate

WASHINGTON, DC 20510–4305
March 16, 2005

The Honorable Alberto R. Gonzales
Attorney General of the United States
Department of Justice
Room 4400
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Dear General Gonzales:

During your confirmation hearing before the Senate Judiciary Committee on January 6, 2005, you expressed your commitment to work with Senator Leahy and me on the issue of openness in government. I am pleased to report to you that, in the ensuing months, substantial progress has been made on this issue in the United States Senate.

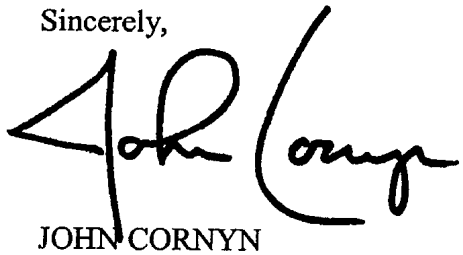
Last month, Senator Leahy and I introduced the OPEN Government Act of 2005 – legislation to promote accessibility, accountability, and openness in government, principally by strengthening the procedures that govern the administration of the Freedom of Information Act. I am pleased to report that this bipartisan effort has already been joined by Senators Isakson and Alexander, and I am grateful that the Justice Department's website notes that the bill "holds the possibility of leading to significant improvements in the Freedom of Information Act."

I chaired a Senate Judiciary subcommittee hearing yesterday morning to examine the provisions of the OPEN Government Act, and heard testimony from FOIA experts across the political spectrum – including an expert from the office of Texas Attorney General Greg Abbott. As you will recall from your past experiences with Texas law, many of the key provisions contained within the OPEN Government Act are derived from Texas law – including the establishment of a FOIA hotline to empower requestors to track their requests, as well as the imposition of consequences for agencies that fail to comply with the statutory deadlines to respond to requests. According to the Texas Building and Procurement Commission, Texas agencies answered approximately 2 million requests for information in the 2002-03 fiscal year. That is not quite as many as the approximately 3.2 million FOIA and Privacy Act requests received by all federal departments and agencies during fiscal year 2003, according to the Justice Department's "Summary of Annual FOIA Reports for Fiscal Year 2003" – but it does demonstrate that the provisions of the OPEN Government Act have been tested in a state that handles a substantial workload of requests.

I am also pleased to report that, just last week, Senator Leahy and I introduced the Faster FOIA Act of 2005 – legislation to establish an advisory commission to study delays in the processing of FOIA requests. Senator Grassley has agreed to co-sponsor that measure, and I am hopeful that that legislation will also be enacted into law.

Congratulations again on your continued service to your country and to the President. I look forward to working with you to improve openness in government and on other issues of importance to our nation.

Sincerely,



JOHN CORNYN
United States Senator